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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1948.

No. 19

ALFRED S. PENN,
Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,
Respondent.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

This suit is brought under the Federal Employers' Liability Act, based on an alleged violation of the Federal Safety Appliance Act, 45 U.S.C.A., paragraph 2, to recover damages for injuries sustained by plaintiff while working as a switchman for defendant.

The accident occurred in defendant's Yard 8 at Proviso, Illinois. At this location defendant's yard tracks run east and west and branch off from a lead track which

runs northwest and southeast. The accident happened about noon on July 27, 1944, a clear, sunny day. At the time in question the crew with which Penn worked was engaged in switching out a cut of cars from the lead track on to various yard tracks. The engine was headed west and was at the west end of about 20 cars. The engineer was thus on the north side of the train. The switch crew worked on the engineer's side (Rec. 11). It was Penn's duty to cut off cars according to directions marked in chalk on the side of the cars, and he accomplished the uncoupling by means of a pin lifter. Plaintiff testified that shortly before the accident the train was standing still; that on the first or most easterly car he saw a chalk mark which said "one car", thereby meaning that the lead car was to be cut off; that Conductor Wescott, who was stationed 500 or 600 feet east of where Penn stood, gave a kick signal, and within 20 or 30 seconds thereafter the train moved to the east; that at about the time the train started Penn stepped on the stirrup on the northwest corner of the lead car (Rec. 13). Penn testified that he stepped on the car in question at a point about 50 or 60 feet west of switch No. 35 (Rec. 30). He boarded this car because it was a hot day and running 15 or 20 feet alongside the moving train every few minutes to pull pins became pretty tiresome (Rec. 14). Located at the northwest corner of the lead car was the pin lifter. This is a rod about 4½ feet long, with the outside end bent to form a handle. The inside end of the rod was fastened to a link which, in turn, was connected with the coupler pin (Rec. 14). The coupler was of standard make. It is agreed that freight cars cannot be and are not intended to be uncoupled unless the slack in the couplers is "in" or bunched (Rec. 15). When the slack is in the pin may be lifted by pulling up on the handle at the end of the pin lifter rod

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and by so doing the knuckles of the couplers are opened, thus permitting the cars to part (Rec. 15). Penn stated that he got on the lead car while the train was standing still. At that time he could not tell whether the slack was in or out, and he admits that it might have been either way (Rec. 32). Of course, if the slack had been out at the time he boarded the car it would have been impossible for him to have pulled the pin. Penn stated that with the first move to the east the slack might have run out (thereby preventing the pin from being pulled) (Rec. 34). With the next impact (2 or 3 seconds later) the slack came in again (Rec. 35). Penn says that as he stood on the stirrup at the side of the car he was stretched out in an awkward position, his left hand being on a rung of the ladder on the side of the car and his right hand stretching out to grasp the handle of the pin lifter (Rec. 37); that after the train had moved a short distance toward the east and the slack had once more come back in, he made 5 or 6 efforts to pull up on the handle (Rec. 15). . Due to the position in which he stood, plaintiff was unable to get any leverage on the pin (Rec. 38). Finding that 5 or 6 efforts to operate the pin from the side of the car were unavailing because proper leverage could not be obtained, Penn stepped to the ground where he would have proper leverage (Rec. 38). When plaintiff alighted, the train was going from 6 to 8 miles an hour (Rec. 35). He ran 3 or 4 steps during which time he gave three hard pulls on the pin (Rec. 35). He says that on the third pull the pin lifter operated properly, the pin came up, the knuckles opened and the lead car was cut off (Rec. 37). In the process of running the 3 or 4 steps, plaintiff's left foot was caught in the space between the rod and ties at No. 35 switch. A fracture in the left ankle resulted (Rec. 59, 112).

Following the accident plaintiff made no verbal complaint about the pin lifter not working (Rec. 77). On the same day as the accident occurred, plaintiff signed a report (Defendant's Exhibit 3) in which he described the occurrence as follows: "I was pulling pins and conductor give a cut sign and train was going a little fast and I got off to pull a pin and I stepped in Track 35 switch and caught my heel in between switch rod and tie and turned my left ankle" (Rec. 39, 181, 182). The report makes no complaint of the coupling device.

On July 28, 1944, plaintiff signed a typewritten narrative form version of the occurrence (Defendant's Exhibit 4). Immediately above his signature he wrote the words "I have read this statement and it is true." The incident is thus described: "I just did not look where I was stepping and stepped in between the tie and bridle. I was not interfered with by any one else or any other cars. There was nothing wrong with any of the equipment that had anything to do with this accident" (Rec. 39, 59).

On November 15, 1944, plaintiff signed another typewritten narrative form statement of the occurrence and wrote a similar acknowledgment to the effect that he had read the statement and that it was true (Rec. 40, 60, 61). In the November 15 statement plaintiff said the car involved was an "old timer" and that "the pin lifter was about 3½ feet from where I hung on the ladder. This is further away than usual and I could not pull it because I did not have sufficient leverage stretched out as I was to pull out and up on the pin and hang on at the same time. There was nothing wrong with the pin lifter, as soon as I got off I pulled it all right and it operated properly. I do not know what the car number was, but I do know that the pin lifter operated all right when I got off and pulled it." Each of these

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three written statements was admitted in evidence without objection (Rec. 58, 59, 60) and no contention is made that plaintiff was imposed on in any way when he signed any of these statements.

On plaintiff's case the only occurrence testimony was that given by Penn himself. On defendant's case, conductor Wescott and engineer Fairchild testified as occurrence witnesses (Rec. 77, 124). Wescott stated that at the time Penn tried to cut off the leading car, plaintiff was at all times on the ground and that he never reached the pin but stepped in the switch stand space on his way to the side of the car (Rec. 79). Wescott stated that after the accident he operated the pin lifter and that it then worked properly (Rec. 80). Engineer Fairchild stated that the train had not come to a stop just before the car in question was kicked down the track; that the train was permitted to drift slowly ahead from one kick until the next; that he saw Penn come toward the cars and saw him stumble and fall on his way to the first car; that he did not see him try to get the pin or have any trouble in pulling it (Rec. 126).

At the close of all the evidence defendant moved for a directed verdict in its favor (Rec. 6). This motion was denied by the court (Rec. 6, 149). Thereafter, the jury returned its verdict, finding defendant guilty and assessing plaintiff's damages in the sum of $15,000 (Rec. 190). Judgment was thereupon entered on the verdict. Within the time permitted, defendant filed its motion for judgment notwithstanding the verdict and, in the alternative, for a new trial or for a remittitur. The trial court overruled each of these motions, and thereafter defendant appealed to the Circuit Court of Appeals.

In its opinion reported in 163 F. 2d 995, the Circuit Court of Appeals held that the evidence was insufficient to take the case to the jury; that the pin was lifted and

the cars were uncoupled, so that evidence did not prove the allegations of the complaint that the coupler was defective "in that the same could not be uncoupled by means of the pin lifter". The Court of Appeals reversed the judgment and remanded the case to the trial court with directions to grant defendant's motion for judgment in its favor notwithstanding the verdict. In reaching its conclusion the Court of Appeals reasoned that the undisputed evidence showed that plaintiff was not in such position that he could operate the coupler while he was stationed on the side of the car; that plaintiff recognized that this was the case and placed himself on the ground so that he could make a reasonable effort to operate the pin lifter; that although plaintiff stated that while on the ground he made three attempts to lift the pin before he succeeded, it is evident that the coupler operated within a second or two after plaintiff had put himself in a position where he could use sufficient force; that the fact the coupler did not operate while plaintiff was awkwardly positioned on the car is not proof of a defect and that the fact that the coupler operated so readily after plaintiff was in a position where he could get leverage dispelled any inference of a defect which might have arisen from plaintiff's previous unsuccessful efforts. In view of the conclusion of the Circuit Court of Appeals that the judgment notwithstanding the verdict was proper, it became unnecessary for that court to rule on defendant's further contention that the trial court erred in instructing the jury.

Plaintiff's petition for certiorari having been granted by this court, the case is now here on the sole proposition of whether there was any substantial evidence in the record to sustain plaintiff's complaint. The question of error in the instructions given the jury by the court on behalf of plaintiff is not now presented to this court.

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PROPOSITIONS OF LAW RELIED ON.

I.

The Circuit Court of Appeals Properly Concluded There Was No Substantial Evidence to Prove That Defendant Used a Coupler Which Failed to Comply With the Safety Appliance Act.

St. L. & San Fran. R. R. v. *Conarty*, 238 U. S. 243, 250;

Chicago M. St. P. & P. R. Co. v. *Linehan*, 66 F. 2d 373 (C.C.A. 8);

Meisenhelder v. Byram, 182 Minn. 615, 233 N. W. 849;

Western & Atl. R. R. v. *Gentle*, 198 S. E. 257 (Ga. A.);

Chesapeake & O. Ry. Co. v. *Charlton*, 247 F. 34 (C.C.A. 4);

Devaney v. *A. T. & S. F. Ry. Co.*, 219 Calif. 487, 27 P. 2d 635;

Pennsylvania R. Co. v. *Jones*, 300 F. 525 (C.C. A. 6);

Southern Ry. Co. v. *Montgomery*, 46 F. 2d 990 (C.C.A. 5);

Sheffield v. *Cantwell*, 101 F. 2d 351 (C.C.A.7);

"Opinion Evidence in Illinois" by King & Pillinger, p. 330:

Bramwell v. *U. S. Fidelity Co.*, 269 U. S. 483, 489;

San Antonio Ry. v. *Wagner*, 241 U. S. 476.

II.

Where There Is No Substantial Evidence to Prove Plaintiff's Case the Trial Court Should Direct a Verdict for Defendant.

Brady v. *So. Ry. Co.*, 320 U. S. 476, 479;

Myers v. *Reading Co.*, 331 U. S. 477, 485.

III.

Errors of Law Not Argued Because Not Considered By Circuit Court of Appeals.

Aetna Casualty & Surety Co. v. *Flowers*, 330 U. S. 464.

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ARGUMENT.

I.

The Circuit Court of Appeals Properly Concluded There Was No Substantial Evidence to Prove That Defendant Used a Coupler Which Failed to Comply With the Safety Appliance Act.

At the time the case went to the jury, the complaint contained the single charge that defendant "carelessly, negligently and unlawfully equipped and maintained on said car a defective coupler in that the same could not be uncoupled by means of the pin lifter, contrary to the provisions of the Federal Safety Appliance Act" (Rec. 3, 149).

The Act of Congress upon which this suit is based is found in Title 45 U.S.C.A., par. 1, *et seq.*, passed March 2, 1893. Section 2 of this act makes it unlawful for a railroad to haul or use in interstate commerce a car "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Respondent contends that there was no substantial evidence to sustain the charge in plaintiff's complaint, and that therefore the Circuit Court of Appeals properly reversed the judgment and remanded the cause with directions to grant defendant's motion for judgment in its favor, notwithstanding the verdict.

The purpose of Section 2 of the Safety Appliance Act of March 2, 1893, has been described in *St. L. & San Fran-*

cisco R. R. v. *Conarty*, 238 U. S. 243, as follows (page 250):

> "It is very plain that the evils against which these provisions (Safety Appliance Acts) are directed are those which attended the old-fashioned link and pin couplings, where it was necessary for men to go between the ends of the cars to couple and uncouple them, and where the cars when coupled into a train sometimes separated by reason of the insecurity of the coupling."

Courts of review have uniformly held that before a coupler case may be said to present a jury question under the circumstances here involved, two things must be shown:

(a) that an honest and reasonable effort to operate the coupler was made by the injured employee at a time when the coupler reasonably could have been expected to operate, *i. e.* when the slack was bunched.

(b) that the coupler failed to work.

In *Chicago M. St. P. & P. R. Co.* v. *Linehan*, 66 F. 2d 373 (C. C. A. 8), the court said:

> "If plaintiff failed to operate the coupler in a proper manner, the fact of its not working would be no evidence of defect. Just how much force may be necessary in operating the pin lever in order to bring about an opening of the knuckle cannot be definitely stated. There is no accurate measuring stick. One pull of the lever might be sufficient if enough force were put behind it, and there might be as much force exerted in one pull as in two or three. The question must be, Was there an earnest and honest endeavor to operate the coupler in an ordinary and reasonable manner, and was enough force applied to open the knuckle if the coupler was in proper condition?"

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Another case holding that the mere failure of a coupler to operate does not in and of itself constitute a violation of the Safety Appliance Act is *Meisenhelder* v. *Bryam*, 182 Minn. 615, 233 N. W. 849. There a suit was brought to recover damages for the death of plaintiff's intestate who was employed by defendant as a brakeman. Judgment for defendant was entered in the trial court, and on appeal the Supreme Court of Minnesota affirmed. The complaint was based on both the F.E.L.A. and the Safety Appliance Act. The fatal accident occurred while an engine and three cars were being backed on a side track. During this process the coupling between the second and third cars opened and the third car separated from the others, so that a space of a few feet was left. Deceased went in between the two cars which had separated, and when he did so he was caught and crushed between the couplers. The evidence in support of the alleged violation of the Safety Appliance Act was that while the cars were moving, deceased rode in the stirrup of one of the cars and several times pressed his foot against the pin lifter without effect. The court held that failure of the pin lifter to operate under these conditions was not determinative, for the reason that, if the slack was out when deceased tried to pull the pin, the pin lifter would not have lifted and was not intended to lift the pin. In the *Meisenhelder* case there was also evidence that after the accident the cars did not automatically couple on the first attempt, but the court observed that this was not an unusual occurrence; that when a test of the couplers was made following the accident in all probability one or both of the knuckles had been partly closed or had moved, thus preventing an automatic coupling; that against any inference that the coupler was defective was the undisputed evidence that there was no mechanical defect in it. The court said at page 850:

"That a coupler fails to operate by use of the pin lifter under proper conditions, is some evidence of a defective condition. But we fail to find any evidence reasonably showing that this coupler or pin lifter so failed. The evidence was insufficient, as a matter of law, to justify any recovery on the ground of an alleged defective coupler appliance."

In *Western & Atl. R. R.* v. *Gentle*, 198 S. E. 257 (Ga. A.) the court reversed a judgment for plaintiff, based on an alleged violation of the Safety Appliance Act, and said on pages 262 and 263:

"The failure of couplers to couple is not *per se* a violation of the act. That, on a given occasion, couplers failed to couple upon impact, does not disrobe them of their character of 'couplers coupling automatically upon impact,' as we construe those terms to be used in this act. By the use of the above term, we do not apprehend that it was the intention of Congress to require railroads to equip their cars with couplers designed to couple automatically upon impact, without the necessity of men going between the ends of the cars, which would, upon all occasions and under all circumstances, actually couple, without fail, upon impact. The railroad has complied with the law when it equips its cars with couplers designed to couple automatically upon impact without the necessity of men going between the ends of the cars, which couplers are of general use among well-regulated railroads, and unless the failure of the couplers to couple on a given occasion results from some defect therein, the railroad cannot be held responsible for injuries resulting proximately therefrom. We think that this is apparent from the mass of adjudications under this section.

To give the act any other construction would result in absurdities, plainly not within the contemplation of Congress in the passage of this act."

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"In many of the adjudicated cases we find it stated that 'the failure of a coupler to work at any time sustains a charge that the Act has been violated.' See *Philadelphia & R. R. Co.* v. *Auchenbach*, 3 Cir. 16 F. 2d 550, 552, and citations. We seriously question the general applicability of this rule to all cases especially to a case of the present character where it appears, from all the evidence, that inferences other than that the couplers were defective are authorized from their failure to couple upon first impact. In no case called to our attention by the very exhaustive and able briefs filed by counsel for both parties, or any that our research has revealed, has it been expressly ruled that the mere showing that upon one occasion couplers did actually fail to couple, authorized a finding that the couplers were defective though it may be inferable therefrom that such be the case. Each of the cases examined, and we have diligently tried to examine all of them, presents a stronger state of facts than those above stated."

Another case holding that a carrier does not become liable for failure of a coupler to operate under any and all circumstances is *Chesapeake & O. Ry. Co.* v. *Charlton*, 247 F. 34, (C.C.A. 4). In that case defendant's brakeman was fatally injured when he went between two freight cars in order to open the knuckle on one of the draw bars, and the cars then came together without warning. The evidence showed that at the time of the accident the knuckles were closed but that if the knuckles had been opened the cars would have coupled automatically. The evidence also showed that it was possible to open the knuckles by lever without going between the cars. The question was clearly presented to the court whether, under the Safety Appliance Act, it was the duty of the carrier not only to equip its cars with appliances that would automatically couple by impact, but also to have the couplers so constructed that

the knuckles would be open at all times so as to permit the coupling to be made without operating the lever extending outside the car. The court held that there was no such absolute duty as stated in the latter proposition; that to so construe the statute would be to require railroads to perform a duty which was impractical. The court stated on page 40:

> "The framers of the act only intended to require the railroads to furnish some kind of an appliance that would automatically couple cars and uncouple the same without exposing employes to the risks that were incident to coupling and uncoupling cars before the date of the passage of the act. The railroads, we think, have fully met this requirement by equipping their cars with an appliance that couples automatically by impact, and so arranged that if the knuckles should, for any reason, become closed that the same could be opened by using the lever at the side of the car, and thereby accomplished the obvious purpose of the statute, *viz.* to have the railroad so construct their couplers that it would be possible to couple and uncouple cars without going between them."

The court in the *Charlton* case, therefore, reversed without remanding.

An excellent review of the various coupler cases arising under the Safety Appliance Act is contained in an opinion of the Supreme Court of California in *Devaney* v. *A. T. & S. F. Ry. Co.*, 219 Calif. 487, 27 P. 2d 635. In that case the court held that there was no absolute liability shown on the railroad merely because the coupler failed to uncouple. The leading cases, including *Minneapolis & St. P. R. R. Co.* v. *Gotschall*, 244 U. S. 66, are reviewed in detail and reconciled. On page 638 of the opinion the court states that the question in each of the reported cases involving the Safety Appliance

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Act where the verdict or judgment was for the plaintiff was whether, under the particular facts, the trier of the facts was entitled to find that the device was defective. In none of the reported cases was the carrier held liable where the effort to couple or uncouple was not made under ordinary conditions or at a time when the coupler was not expected to operate; that in a situation such as that presented in the *Gotschall* case, where the train broke in two, it was obvious that the happening of such an unusual occurrence was sufficient to uphold a finding that a defect existed.

In *Pennsylvania R. Co.* v. *Jones*, 300 F. 525 (C.C.A. 6) plaintiff brought suit against defendant railroad to recover damages on account of injuries sustained by him while working as a brakeman. The basis of the suit was defendant's use of a coupling device which could not be operated in uncoupling without the necessity of going between the cars, and the provisions of the Safety Appliance Act were invoked. Plaintiff in the *Jones* case rode on a stirrup of one of the freight cars and pushed down with his foot against the pin lifter several times without succeeding in operating the pin. Plaintiff then decided that he could get a better result if he assumed another position, and accordingly shifted his body so that he could put his whole weight on the pin lifter. This time the pin lifted and the cars uncoupled, but at about the time they uncoupled there was a violent jerk of the train and plaintiff was thrown to the ground and injured. The court held that the fact that the pin did not work might be sufficient evidence of an existing defect "if it also appears that the effort was of a character and made at a time when it would have naturally been effective save for a defect"; but the court also observed that because of the refusal of the trial judge

to give one of defendant's requested instructions it was not necessary to decide the legal point of whether two unsuccessful attempts, followed by a third and successful attempt showed a violation of the Safety Appliance Act. The refused instruction which was held sufficient to warrant a reversal was one tendered by defendant, which told the jury that if plaintiff's inability to operate the lever on the first attempt was because of the friction between the coupler and the pin or because of the position of the two freight cars in relation to each other, and not because of any defect in the coupling apparatus, such failure to operate from that cause would not show a violation of the Safety Appliance Act. In the *Jones* case plaintiff argued that the refusal to give the instruction was not error because there was no evidence that the failure to work was because of the condition of the slack. The court stated, however, that it could not accept this suggestion, because plaintiff's own testimony tended to show that while a train was being pushed by an engine there would be friction on the coupler pin and also that while slack was out the pin could not be pulled because of friction; that perhaps there was no friction on the pin for either reason, but that the court could not assume something not shown by the record, in order to decide that there was no prejudice from the erroneous instruction. Accordingly, a new trial was ordered.

No cases have been found which hold that the purpose of Section 2 of the Act is to impose on carriers the absolute duty to furnish couplers which, regardless of force exerted or any other condition or circumstance, uncouple instantly on the first attempt to pull the pin. At the time of plaintiff's attempts to operate the pin lifter in the instant case, the train was going at a speed of six or eight miles an hour (Rec. 17). If the speed

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of the train was, in fact, eight miles an hour this would mean the train was moving approximately 12 feet a second. If it is assumed that plaintiff took three running steps beside the train and not just one or two as stated in the complaint (Rec. 2), plaintiff must have moved along with the train a distance of about 12 feet, during an elapsed time of approximately one second. It thus appears that the essence of plaintiff's complaint is that after he got into a proper position to operate the pin lifter it took him as much as a second to pull the pin. If one second is too long, how much time may elapse in pulling a pin without violating the Safety Appliance Act? No more than half a second? No more than a quarter of a second? In each reported case we have found which involved a situation where the carrier was held liable for failure to furnish a proper coupler, either the coupler itself broke or the injured employe was wholly unable to effect an uncoupling by the use of the pin lifter.

We call attention to the fact that plaintiff's own testimony conclusively proves that the cars were uncoupled by the use of the pin lifter, and "without necessity of men going between the ends of the cars". Consequently, the charge in plaintiff's complaint that defendant unlawfully maintained a defective coupler "in that the same *could not be uncoupled* by means of the pin lifter" remains unproven. The rule that in Federal courts a plaintiff can recover only on the allegations of his pleadings and cannot recover on some other act appearing in the proof, is so well settled that it is necessary to cite only two of many such cases: *Southern Ry. Co.* v. *Montgomery*, 46 F. 2d 990 (C.C.A. 5) and *Sheffield* v. *Cantwell*, 101 F. 2d 351 (C.C.A. 7).

Petitioner complains that "the Circuit Court of Appeals has erroneously decided the case upon a false

factual situation", in that the Court of Appeals has erroneously found that plaintiff mounted the car next to the one to be uncoupled; that in truth plaintiff rode the car that was supposed to be cut off (Br. p. 7). Accordingly, the error of the Court of Appeals complained of is in stating that petitioner was on the car next to the one to be cut off, rather than on the car to be cut off.

It is perfectly clear that the opinion of the Court of Appeals is not based on the matter of which car plaintiff was riding, but is founded on the proposition that the evidence was insufficient to prove that the coupler failed to comply with the requirements of the Safety Appliance Act. As the Circuit Court of Appeals pointed out, it is plain that petitioner was not in a position where he could properly operate the coupler. Whether plaintiff's awkward position was caused by his riding on one car or the other is immaterial. Recognizing the fact that he was in an awkward position, plaintiff stepped to the ground to get the necessary leverage (Rec. 38). The fact that the pin did not lift while plaintiff was awkwardly positioned, but did lift when petitioner got to a place where he could make an honest and reasonable effort, dispels any inference of coupler defect which might possibly arise. Since plaintiff produced no expert testimony to enlighten the jury on the proper method of operation of a pin lifter, there is nothing in the record to indicate that several preliminary attempts to lift the lever were anything out of the ordinary. Apparently it was the usual thing to have to run 15 or 20 feet alongside the moving train for it was to avoid the "tiresomeness" of taking these steps that plaintiff boarded the train just before the accident (Rec. 14).

Plaintiff's testimony that when he first pulled the pin it should have come but did not (Rec. 16), is nothing but an

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unsupported opinion on an ultimate issue and is without any probative force. As stated by the text in "Opinion Evidence in Illinois" by King & Pillinger at page 320:

> "In cases other than sanity and land value cases, the courts have frequently referred to 'naked opinions' or 'unsupported opinions' on ultimate issues as without any probative force (citing cases)."

On pages 8 to 11 of petitioner's brief, six Supreme Court of the United States cases are cited as being in support of plaintiff's position. A careful examination of each of these cases shows that not one of them involved a similar factual situation. Counsel for plaintiff has quoted passages from some of these cases in an effort to bolster his position. It is well settled that a judicial opinion, like a judgment, must be read as applicable only to the facts involved and is authority only for what is actually decided. *Bramwell* v. *U. S. Fidelity Co.*, 269 U. S. 483, 489..

On page 8 of his brief petitioner cites the case of *Myers* v. *Reading Co.*, 331 U. S. 477, but that case involves an entirely different statute from the one here under consideration. The question before the court in the *Myers* case was whether the hand brake upon which plaintiff was working when injured complied with the provisions of the statute that "all cars must be equipped with secure sill steps and *efficient* hand brakes". This court held that it was a question of fact for the jury to decide whether the hand brake which unexpectedly spun around was an "efficient one within the meaning of the statutory requirement". We fail to see how the statute involved in the *Myers* case has any bearing on the section involved in the case at bar. Counsel's quotation from the *Myers* case is somewhat misleading in that he has failed to indicate that the language set out is actually part of this court's quotation from *Spotts*

v. *B. & O. R. Co.*, 102 F. 2d 160, 162. That case, like the *Myers* case, is concerned solely with the operation of a handbrake, not a coupler. Neither this court in the *Myers* case nor the Circuit Court of Appeals in the *Spotts* case had before it the question of what constituted proper operation of a coupler. It is to be noted that there are two sections of the Safety Appliance acts which are numbered "2". The first "Section 2", and the one involved in the instant case, is contained in Title 45 U.S.C.A., paragraph 2, and is part of the Act of Congress passed March 2, 1893. The other "Section 2", and the one involved in the *Myers* case, is contained in Title 45 U.S.C.A., paragraph 11, and is part of the Act of Congress passed April 14, 1910. Obviously, these two acts are wholly independent. The fact that the word "efficient" is used in the hand brake section does not mean that the same standard is required in the coupler section.

The next case relied on by plaintiff is *Chicago, R. I. & Pac. Ry. Co.* v. *Brown*, 229 U. S. 317. Counsel has distorted the sense of his quotation from that case by the simple expedient of omitting some of the words of the opinion. Counsel gives the impression that this court there held that "the failure of a coupler to work at any time sustains a charge of negligence in this respect, *no matter how slight the pull on the uncoupling lever*" (italics as applied by counsel for plaintiff). What this court actually said in the *Brown* case was that counsel for the railroad had conceded that two earlier cases decided by this court had held that the failure of a coupler to work at any time proved negligence, "no matter how slight the pull on the coupling lever." In the *Brown* case the court itself did not hold that counsel's concession was the law. Three years after the *Brown* case was decided, this court expressly pointed out in *San Antonio*

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Ry. v. *Wagner*, 241 U. S. 476, that it did not hold in the *Brown* opinion that counsel's concession there was the law. On page 484 of the *Wagner* case this court said "We need not in this case determine what was conceded in *Chicago R. I. & Pac. Ry.* v. *Brown*, 229 U. S. 317, 320, that the failure of a coupler to work at any time sustains a charge that the Act has been violated."

The next case upon which counsel for plaintiff relies is *Minneapolis, St. Paul and Sault Ste. Marie Ry.* v. *Popplar, Admr.*, 237 U. S. 369. There deceased, in the course of his duties as a brakeman, "tried repeatedly" to uncouple the head car by pulling on the coupling pin with the lifter at the end of the next car but could not succeed in so doing. All his efforts failing, he finally went between the ends of the two cars to effect the uncoupling by hand and while doing this was killed.

This case was originally tried in a Minnesota state court. Judgment for plaintiff was affirmed by the Supreme Court of Minnesota and the case is reported in 141 N. W. 798. From the Minnesota Supreme Court opinion it appears that there was only one eyewitness to the accident, and that such witness not only testified to deceased's total inability to pull the pin but that that witness also stated that "after the accident he himself tried to lift the pin on the car and could not do it; that it came up half way and blocked" (Op. p. 799). This evidence was further supported by evidence from deceased's conductor that after the accident he found that the coupler could be operated only "with difficulty" and that in his opinion it was a "bad coupler". We submit that the *Popplar* case is readily distinguishable from the one at bar. Popplar's "repeated efforts" just before the accident were all unsuccessful, and after the accident a witness who tried to pull the pin was also

wholly unsuccessful. On the other hand within a second of the time Penn got in a position where he could apply sufficient leverage he succeeded in pulling the pin and he himself admitted that it worked properly (Rec. 37). If the three efforts made by Penn while he ran beside the car had failed to produce an uncoupling, it might well be argued that a jury question was presented. This, however, was not the case.

The next case cited by plaintiff is *St. Joseph & G. I. R. Co.* v. *Moore*, 243 U. S. 311. This also is not a coupler case. Plaintiff's complaint was based on the claim that his injuries resulted because defendant failed to equip its tender with grab irons or hand holds as provided for by Section 4 of the Safety Appliance Act of 1903 (Title 45 U. S. C. A. Par. 4), which requires the use of "secure grab irons or hand holds in the ends and sides of each car for greater security to the men in coupling and uncoupling cars". The sole question involved in the *Moore* case was whether the carrier could be held liable for failure to furnish a hand hold as required by the Act, even though it did provide a pin lifter rod which could have been used as a substitute for the hand hold. This court held that the statute was clear that hand holds in addition to pin lifter rods were required. Obviously, that case has no bearing on the question now before this court.

On page 10 counsel relies on *Minneapolis & St. L. R. Co.* v. *Gotschall*, 244 U. S. 66. The question involved in that case was whether the jury could infer negligence on the part of the carrier from the fact that a coupler unexpectedly opened while a freight train was en route, as a result of which fatal injuries occurred. The court held there might be such inference of negligence "in view of the positive duty imposed by the statute upon

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the railroad to furnish safe appliances for the coupling of cars". Obviously, a coupler which pulls apart for no apparent reason is not one which couples and uncouples automatically within the meaning of the Safety Appliance Act. Admittedly, the coupler in the *Gotschall* case was a defective one. That is not the case here.

Plaintiff's last case on the subject of coupler operation is *Chicago Burlington & Quincy Ry.* v. *U. S.*, 220 U. S. 559. That case was a penalty suit to recover a fine for the use by the carrier of cars on which couplers were admittedly defective. The case merely holds that regardless of negligence the carrier has "an absolute duty" to furnish cars equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. The court did not decide, and was not called on to decide, what was conceded in *Chicago, Rock Island & Pac.* v. *Brown*, 229 U. S. 317, that failure of a coupler to work at any time, regardless of condition of slack and amount of force used, sustains a charge that the Act has been violated.

II.

Where There Is No Substantial Evidence to Prove Plaintiff's Case the Trial Court Should Direct a Verdict for Defendant.

Plaintiff appears to proceed on the theory that, whatever the evidence, a jury verdict must remain inviolate, and that directing a verdict invariably amounts to a substitution of the opinion of the court for that of the jury. Such is not the case.

In *Brady* v. *So. Ry. Co.*, 320 U. S. 476, this court said, commencing at page 479:

"The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case the jury. *Western & Atlantic R. Co.* v. *Hughes, supra; Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, 524. *Cf. Gunning* v. *Cooley*, 281 U. S. 90, 94; *Commissioners* v. *Clark*, 94 U. S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. *Galloway* v. *United States*, 319 U. S. 372; *Pence* v. *United States*, 316 U. S. 332; *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, n. 1; *Anderson* v. *Smith*, 226 U. S. 439; *Coughran* v. *Bigelow*, 164 U. S. 301, 307; *Gunning* v. *Cooley*, 281 U. S. 90, 93, note; *Seaboard Air Line* v. *Padgett*, 236 U. S. 668, 673; *Parks* v. *Ross*, 11 How. 362, 373. See IX Wigmore on Evidence (3d ed., 1940), Paragraphs 2494, *et seq.*"

This court has never retreated from its oft repeated statement that where there is a complete absence of probative facts to support the verdict reversible error occurs. As recently as *Myers* v. *Reading Co.*, 331 U. S. 477, at page 485, the court stated the controlling principle governing the direction of a verdict as follows:

"The respondent is not subject, as has been suggested, to an absolute liability to its employees comparable to that established by a workmen's compensation law. (See *Griswold* v. *Gardner*, 155 F. 2d 333, 334, 337.) • • • The requirement is for probative facts capable of supporting, with reason, the conclusion expressed in the verdict.

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'Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. "The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." *Galloway* v. *United States*, 319 U. S. 372, 395 • • •.' *Tennant* v. *Peoria & P. U. R. Co., supra*, at pp. 32-33.

See also *Blair* v. *Baltimore & O. R. Co.*, 323 U. S. 600; *Brady* v. *Southern R. Co.*, 320 U. S. 476; *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 343; *Western & A. R. Co.* v. *Hughes*, 278 U. S. 496; and *Baltimore & O. R. Co.* v. *Groeger*, 266 U. S. 521, 524."

III.

Errors of Law Not Argued Because Not Considered By Circuit Court of Appeals.

On defendant's appeal to the Circuit Court of Appeals, two grounds of error were urged, that:

(1) The court erred in refusing to grant defendant's motion to instruct the jury to find defendant not guilty; and

(2) The court erred in giving to the jury plaintiff's Instruction E.

Because the Circuit Court of Appeals concluded that there was no substantial evidence to sustain the verdict, and for that reason remanded with directions to enter a judgment notwithstanding the verdict, it was not necessary for it to consider or pass on the errors complained of in instruction E. Counsel for plaintiff has not asked this court to pass on the validity of our objections to instruction E and has refrained from arguing the points involved. Consequently, we shall do like-

wise. *Aetna Casualty & Surety Co. et al.* v. *Flowers*, 330 U. S. 464.

CONCLUSION.

We respectfully submit that it is abundantly clear that the Circuit Court of Appeals properly ruled that there was no substantial evidence in the record proving that the car in question failed to comply with the requirements of Section 2 of the Safety Appliance Act.

Respectfully submitted,

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